FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

FROM: MARY W. DOVE
SECRETARY OF THE COMMISSION

DATE: July 23, 2003

SUBJECT: *Ex Parte* COMMUNICATION REGARDING
REVISED DRAFT AO 2003-17

Transmitted herewith is a letter sent by Mr. Craig Engle to Vice Chairman Bradley A. Smith regarding the above subject matter.

Proposed Advisory Opinion 2003-17 is on the agenda for Thursday, July 24, 2003.

Attachment:

4 pages

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Mr. Bradley A. Smith
Vice-Chairman
Federal Election Commission
999 E Street, N.W.
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Re: Comment to Advisory Opinion Request 2003-17

Dear Vice Chairman Smith:

Please accept the following comments to the re-draft of Advisory Opinion 2003-17. These comments do not address the wisdom of the Commission's personal use regulations or the correctness of their application in prior Advisory Opinions. Instead, these comments reply to the U.S. Attorney's May 30, 2003, letter to the General Counsel and urge the Commission not to base its decision on the rationale it offers. It closes with several comments about the draft, itself.

The U.S. Attorney's Letter

The prosecutors admit in their opening and closing paragraphs that the Commission should deny Mr. Treffinger's request "as a matter of public policy" rather than as a matter of law or precedent. In support of this, the prosecution makes three points: this is a criminal and not a civil matter; Mr. Treffinger is not a federal officeholder and is no longer a candidate for federal office, and Mr. Treffinger has entered a guilty plea to several charges. Accordingly, the prosecutors want any leftover campaign funds safeguarded for the restitution they won rather than spent in Mr. Treffinger's defense. Each of these arguments is addressed in turn.[1]

1. A Matter of Public Policy. Congress did not grant the FEC the power to create public policy when it enacted the FECA. In fact, Congress placed very specific limitations on the FEC's power to render Advisory Opinions, expressly stating the Commission cannot establish any new rule of law in answering a request. 2 U.S.C. § 437f(b).

The reason that only Congress, as a nationally-elected body, is responsible for collectively determining this country's public policy is because one person's view of public policy may be another person's private penalty. If the government wishes to prohibit candidates from using campaign funds to pay certain legal expenses, then the Department of Justice, itself, should raise that as a legislative matter before Congress. Similarly, the Commission could pose this question

[1] Comments from the Justice Department on how the Commission should apply the FECA to a former federal candidate it prosecuted touches on the FEC as an independent agency. *See* Brief of the Federal Election Commission in Response to the Solictor General at 5, 15-17 in *FEC v. NRA Political Victory Fund*.

in a rulemaking or, if it considers the concept to be without statutory support, include it in its annual legislative recommendations.

2. Civil vs. Criminal Matters. The prosecution wants the Commission to distinguish the three advisory opinions cited by the defense because they addressed the payment of legal fees resulting from civil or public relations matters. Essentially, the prosecutors are saying this defendant should have *less* access to campaign funds because the charges are *more* serious.

With all due respect, this turns notions of criminal defense on its head. The rights afforded a defendant in a criminal proceeding are usually more expansive than the rights afforded in a civil proceeding, particularly the right to legal representation. The Sixth Amendment explicitly recognizes the right to counsel in a criminal trial, and yet the right is not guaranteed in civil or administrative matters. The right to counsel attaches at the pleading state and a person is guaranteed the assistance of counsel even after entering a plea of guilty.

This summary is not meant to suggest the Commission's decision here implicates the Sixth Amendment's right to counsel. Instead, it illustrates the seriousness of ensuring representation in criminal matters. Because the Commission already allows campaign funds to be used in answering civil complaints and press inquires, it seems obvious and essential this be extended to criminal matters.

3. No Longer a Candidate and Never an Officeholder. The prosecutors' "most important[]" argument is Mr. Treffinger is not a federal officeholder nor was he when he completed the illegal acts; so he cannot rely on the argument these are "expenses incurred in connection with duties of the individual as a holder of Federal office." True. But the requestor is relying on the regulation's other allowance for using campaign funds to refute charges regarding the *campaign*. This allowance is true win or lose, incumbent or not. The prosecutors try to rebut this by noting Treffinger is no longer a candidate for federal office so he cannot contend legal expenses are necessary for his campaign. The Commission has quite wisely never said the sources available to pay for one's defense change when the campaign is over.

The prosecution also claims Section 439(a) should not be interpreted to mean a candidate can commit a criminal act in furtherance of his campaign and designate the legal defense "as a campaign expense." That is not the question. The exact question is whether the expenses are a "personal use" not whether they are a campaign cost. In fact, other expenses that are not direct campaign costs are what Operating Expenses are designed to disclose.

4. A Plea of Guilty. The prosecution's last argument is that it is essential to distinguish between expenses which arise because of legal campaign activities as opposed to illegal activities.

The prosecution is making a very serious point: someone who has plead guilty to hindering an investigation and using the U.S. mail to file misleading FEC reports cannot use *any* leftover campaign funds to defend himself against *any* allegations that he engaged in illegal activity to benefit his campaign. The prosecution wants this to hold true even though 18 out of the 20 charges were not proven, including charges that Mr. Treffinger extorted campaign contributions, made other false statements to and with his campaign treasurer, and misrepresented another candidate's authority. All of these campaign related charges required a defense.[2]

But the Commission need not concern itself with Mr. Treffinger's confessed guilt or presumed innocence on all other counts. All it must determine is whether the legal claims brought against Mr. Treffinger would have occurred irrespective of his campaign.[3] This is true regardless of how meritorious or dubious the charges are.

In summary, the Commission should base its decision on the facts before it and its own jurisprudence. Ancillary considerations of public policy and aspects of the defendant may be interesting, but are irrelevant to your decision. Instead, the Commission must decide how to apply its regulations as written with the assistance of prior Advisory Opinions.

The Draft Advisory Opinion

In answering this request, it is important the Commission's written legal standards do not jump around too much. For example the draft states, with a citation to four opinions, that legal expenses in defense of allegations "relating directly" to the candidate's campaign may be paid with campaign funds. page 8 lines 1-4. The draft then states, without citation to authority, that paying for the "defense against allegations that are not directly related" to campaign activity is personal use.[4] page 8, lines 4-6. The draft also states, with a citation to authority, that "if a candidate can

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[2] In its letter, the prosecution suggests a candidate should not be able to assert he robbed a bank to finance his campaign so his legal costs are a campaign expense. This is a bad analogy. Mr. Treffinger did not rob a bank. He plead guilty hindering an investigation mailing three misleading FEC reports. The Commission should avoid using catchy analogies, and answer this request on the basis of what happened here and not some other hypothetical place.

[3] As an aside, the prosecution writes Mr. Treffiner pled guilty to wrong doing *as* the Essex County Executive. This does not seem to follow all the facts since Count 14 alleges Mr. Treffinger used the U.S. mails to file misleading FEC reports. That appears to be in his capacity *as* a candidate for federal office.

[4] Opinions cited in the draft as authority for a "directly related" test cannot be read to support a "not directly related" either/or analysis. Advisory Opinion 1998-1 actually has several different holdings including allowing 100% use of campaign funds regarding pre-candidacy allegations not directly related to campaign or officeholder conduct when investigated by the House Ethics Committee, and approving the use of 50% campaign funds in other cases. Advisory Opinion 1997-12 notes the political necessity for a Congressman to reply to allegations because of his elevated position allows defense costs to be paid with 100% campaign funds even if allegations could exist irrespective of candidacy and 50% even if the charge does not directly relate to allegations arising from the campaign. Advisory Opinion 96-24 stated a "candidate" (not officeholder) is entitled to use campaign funds to publicly respond to allegations even if the underlying activities were not campaign-related. The Commission expressed no opinion in

Footnote Continued

reasonably show that the expenses at issue resulted from campaign" activity they would not be a personal use. page 8, footnote 5.

These are not three ways of saying the same thing. Applying any one of those tests in isolation could, in fact, yield different answers. In this case, the draft chooses to take the "directly related" approach noting the essence of the allegations; identifying the primary wrong, and disregarding whether the activity inured or was intended to inure to the campaign's benefit, page 8, line 13 - page 10, line 5. Regardless of its application, a "directly related" test is not the "case by case" approach you promised to undertake in the regulations.

I also do not think the draft reaches the right result. Considering what the violation is, or where it occurred, or who it involved is not as relevant as deciding whether and how the charges are related to the campaign. Saying the activities do not "directly relate" to the campaign may be literally true, but would these actions have occurred without the federal campaign? It seems the entire artifice was done for the campaign. And given that most counts repeat and relate to the facts of the other counts, attempting to "allocate" the defense is attempting to divide the indivisible. Defending oneself against this particular prosecution is either campaign related or not.

I offer one final comment on the leftover campaign funds and restitution. The Commission should not adopt, in my opinion, the prosecution's view that certain amounts cannot be considered surplus funds but are the "proceeds of violations of federal extortion law." This was not proven or admitted in the plea agreement. Regarding the restitution, the Commission's draft should not speculate on what this "appears" to be and what priority it should take. [5]

I hope you find these comments helpful to the disposition of this matter.

Sincerely,

Craig Engle

A096-24 on the use of campaign funds for post-campaign legal expenses at a time the officeholder is not seeking election: which is similar to the case today.

[5] The draft's statement this restitution payment "must take priority over the payment of legal fees by the Committee" is wholly without support. No citation is given in support of this new requirement -- because there is none. The timing of the restitution is between the criminal litigants. I believe the Commission has no civil authority to delay payment of attorney fees because of arrangements made in a criminal matter.